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ABSTRACT

Because asbestos exposure poses a serious health threat to school children, Congress enacted the Asbestos School Hazard Detection and Control Act in 1980, authorizing federal funds for local programs to locate and remove asbestos-containing materials. No funds have been made available as yet, however, and two-thirds of the affected schools have failed to comply with the law, since they cannot afford to do so. An alternative course for schools is to seek recovery against manufacturers responsible for asbestos installation. Accordingly, this chapter reviews bases of litigation, citing pertinent case law. A recent report by the Department of Justice concludes that schools may take action for equitable restitution against asbestos manufactureres to recover expenses incurred in removing the asbestos threat. But restitution requires schools to fund the removal outright, and then rely on litigation for reimbursement. Thus other bases of litigation are reviewed, including traditional theories of negligence, strict liability, and breach of warranty, as well as law of equity and bankruptcy. The latter has been used by manufacturers to evade massive litigation by potential victims. Schools searching for relief from asbestos hazards should therefore consider all theories of liability and all potential defenses in such suits. (TE)

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Legal Issues in Asbestos Litigation

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Asbestos refers to a group of fibrous, incombustible, magnesium and calcium silicate minerals.¹ It is a valuable product with many uses, including heat and noise insulation and as a binder.² Asbestos has a tendency to separate into tiny fibers. If these fibers become airborne and are subsequently inhaled into human lungs, death or disablement may result.³

Asbestos is the only known cause of mesothelioma, a painful and fatal cancer of the lining of the lungs or stomach.⁴ Asbestos is also the cause of other disabilities, including asbestosis, a scarring of the lungs that progressively hinders breathing capabilities.⁵

At least one court has concluded that the asbestos manufacturing industry knew about the dangers of airborne asbestos fibers as early as the mid-1930s.⁶ Despite the danger, the industry was "silent with respect to the dangerous relationship between asbestos and cancer."⁷ Further, a convincing case can be made based on industry documents produced in litigation that certain industry officials actively sought to obscure information relating asbestos and fatal diseases.⁸

1. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 152 (25th ed. 1974).

2. U.S. Department of Justice, The Attorney General's Asbestos Liability Report to the Congress prepared pursuant to section 8(b) of the Asbestos School Hazard Detection and Control Act of 1980, 1 (August 1981).

3. *Id.* at i.

4. Reitze, Nicholson, Holdday & Sellkoff, *Application of Sprayed Inorganic Fiber Containing Asbestos: Occupational Health Hazards*, 33 AM. INDUS. HYG. ASS'N J. 178 (1972).

5. *Id.* at 178. See also Commercial Union Insurance Companies, Environmental Task Force, *Asbestos—A Social Problem* 12-14 (May 12, 1981). The Task Force estimates that 67,000 cancers per annum of 17 percent of all cancers detected annually in the United States will be attributable to asbestos exposure.

6. *Supra* note 2 at i.

7. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1355 (E.D. Tex. 1981).

8. *Supra* note 2 at 34. For further treatment of this subject, see ASBESTOS LITIGATION REP. (Feb. 7, 1979).

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Spraying material containing more than one percent asbestos for fireproofing or insulation purposes was banned by the Environmental Protection Agency (EPA) in 1973.⁹ The EPA regulations were promulgated under the authority of the Clean Air Act to prevent asbestos fibers from contaminating outdoor ambient air. However, it later became apparent that these regulations were not sufficiently broad because they only banned use of asbestos as an insulation and fireproofing material but not for decorative purposes.¹⁰ As a result of this concern, in 1978 the EPA amended the regulations to ban asbestos spraying for any purpose.¹¹

Asbestos exposure poses a serious health threat to the general population. Inhaled asbestos fibers deposited in the lungs remain throughout the individual's lifetime. Subsequent exposure to asbestos adds to the body's burden of retained fibers.¹² Scientific evidence strongly supports the contention that children face a greater risk of developing asbestos-related cancer than adults. Mesothelioma generally occurs in the sixth or seventh decade of life, usually 20-40 years after the victim's initial exposure to asbestos. This long latency period combined with other factors such as cigarette smoking, children's faster metabolic rate and increased activity increase the risk of cancer for children exposed to asbestos.¹³

Asbestos was first used in the schools after World War II. From 1946 until the early 1970s when regulations began to be promulgated, tens of thousands of tons of asbestos products were used in American elementary and secondary schools and colleges.¹⁴ According to a recent estimate by the Service Employees International Union, there are probably 11,000 still uncleaned schools with unstable, fiber-shedding asbestos. These schools are attended by 3.24 million children and employ 650,000 adults.¹⁵

In response to concern for the health of school children and employees, Congress enacted the Asbestos School Hazard Detection and Control Act of 1980.¹⁶ In that act, federal funds were authorized to

9. 38 Fed. Reg. 8,826 (1973).

10. *Supra* note 2 at 51.

11. 43 Fed. Reg. 26,372 (1978). Although the spraying of asbestos-containing materials has been banned, the application of asbestos products by trowel has not. *See, supra* note 2 at iii.

12. *Oversight Hearings on Asbestos Health Hazards to School Children, Hearings on J.R. 1435 and H.R. 1524 Before the Subcommittee on Elementary, Secondary, and Vocational Education*, 86th Congress, 1st Sess. 298 (1979).

13. *Id.* at 298.

14. *Supra* note 2 at ii.

15. *Killer in the Classroom*, *The New York Times*, Nov. 13, 1983, 20-E, col. 1.

16. Pub. L. No. 96-270, 94 Stat. 487 (1980).

local educational agencies to conduct programs to find asbestos-containing materials in the schools and take remedial action to assure the safety of school children and employees. Federal regulations promulgated by the department of education set out procedures and criteria to make funds available.¹⁷ Under the regulations, grants would be available to assist eligible schools in identifying asbestos hazards. Interest-free loans would also be available to assist in the correction of those hazards.

However, as yet no funds have been made available. Under the provisions of the Toxic Substance Control Act (TSCA),¹⁸ the EPA has enacted regulations to address the problem of asbestos in schools.¹⁹ Recent EPA regulations require local education agencies (e.g., school districts) to inspect school buildings to identify asbestos materials. School officials must, under the regulations, sample and analyze the friable materials for asbestos. They are further required to notify parents and employees of ways to minimize exposure to asbestos and the potential hazards of exposure. The rule exempts certain schools from its requirements. Compliance by affected schools was required by May 27, 1983. However, the deadline proved ineffective. The EPA reports that approximately two-thirds of the affected schools failed to comply with the law.²⁰

Why are schools confronted with the asbestos hazard seemingly unresponsive to the law? One answer may be that many schools have found dangerous amounts of asbestos but cannot afford to do anything. Clean-up costs a typical school about \$100,000.²¹

One course of action open to school officials is to seek recovery against the individuals responsible for putting asbestos in the school in the first place. Potential defendants in such litigation include architects who selected asbestos materials for use in the school, general contractors and subcontractors who installed asbestos materials, distributors or suppliers of the materials, and manufacturers of asbestos-containing materials. In order to effectively sue for recovery against any of these parties, however, the school may have to abate the asbestos threat at its own expense and immediately sue to recover costs for those remedial actions.²²

17. 34 C.F.R. 230-31 (1981).

18. 15 U.S.C. §§ 2601-2609 (1976).

19. 47 Fed. Reg. 23,360 (1983).

20. *Killer in the Classroom*, *supra* note 15 at 20-E, col. 1. Only elementary and secondary schools are affected by the current laws. This presumably exempts colleges from inspection as well as funding.

21. *Id.* at 20-E, col. 1.

22. A. Anderson & L. Nido, *Responding to the Threat of Asbestos-Containing Materials in School Buildings*, 1 INQUIRY & ANALYSIS 2 (1982).

Equitable restitution is discussed at length in a recent report prepared for Congress by the United States Department of Justice (DOJ).²³ The DOJ report concludes that the most effective remedy for schools may be to institute a civil lawsuit against the manufacturers of asbestos materials found in the schools. The DOJ report states:

Restitution appears to be the most desirable remedy from the prospective plaintiff's standpoint, because it most fits the problem and also may offer the most appropriate and favorable treatment in terms of statutes of limitation. The school districts could allege that the manufacturers who supplied friable asbestos for use in classrooms *without warning* that asbestos fibers are dangerous, and *without testing* to determine the danger in an environmental as opposed to an occupation setting, have a *duty to abate* the resultant hazard and must compensate the party abating the hazard.²⁴

The DOJ Report relies primarily on *The Restatement of the Law of Restitution* and the Supreme Court interpreting the *Restatement* to support its conclusion. Under the "Public Emergency Assistance Doctrine" of the *Restatement*, a party is entitled to restitution for expenses if, e.g. it "removes an obstruction or makes repairs upon a public road which has become imminently dangerous for the traveling public, if the town or person whose duty it is to care for the road fails to do so."²⁵

The DOJ Report concludes that where friable asbestos materials present a situation that is imminently dangerous to the student public, a case for recovery may be made. It argues that asbestos manufacturers who created the condition should be found liable to schools that have abated the asbestos threat at their own expense, since the manufacturers themselves failed to make the necessary repairs.²⁶

The DOJ Report bases its application of the *Restatement* to asbestos on a Supreme Court case that dealt with an analogous situation. In *Wyandotte Transportation Co. v. United States*,²⁷ the U.S. Government removed a sunken barge containing lethal chlorine gas from the Mississippi River. The barge was considered a public hazard. The Court held that the government was entitled to "place the responsibility for removal upon those who negligently sank the vessel."²⁸ The Court relied on the provisions of the *Restatement*, emphasizing (1) that the immediate removal of the barge was essential, and (2) that the negligent owners of the barge refused to remove it.²⁹

23. *Supra* note 2 at 96.

24. *Id.* at 117.

25. *Id.* at 118.

26. *Id.* at 118.

27. 389 U.S. 191 (1967).

28. *Id.* at 204.

29. *Id.* at 205.

One of the most significant drawbacks to employing an equitable restitution theory to all asbestos cases is that it requires the school to fund the remedial program outright and depend on the uncertainties of litigation for reimbursement.³⁰ In many cases, a school may simply not be able to afford the risk of spending money up front that may never be recovered.

Traditional theories of negligence, strict liability and breach of warranty, have generally been more frequently employed than the equitable restitution theory. A New Jersey case, *Cinnaminson Township Board of Education v. National Gypsum Co.*,³¹ was based against manufacturers on strict tort liability, breach of express and implied warranties of fitness and merchantability and negligence. Attorneys for the case did not argue the equitable restitution theory because New Jersey, unlike most states, permits recovery of economic loss under tort law.³²

A similar suit in Texas, *Dayton Independent School District v. United States Gypsum Co.*,³³ relies principally on an argument under the state product liability law that asbestos-containing materials in schools were defective and inflicted property damage on school buildings. However, attorneys for the case included an equitable restitution argument in their brief.³⁴

One significant drawback to employing any theory of liability is the problem of determining which manufacturer was actually responsible for the installation of asbestos. Many schools, particularly older schools, may have lost records crucial to pinpointing the identity of manufacturers, distributors, or suppliers of friable asbestos in their schools. Many schools also face the complex problem of determining who is primarily liable where several manufacturers have supplied asbestos. In many cases it is impossible to determine one company's liability over another.³⁵

In *Borel v. Fibreboard Paper Products Corp.*,³⁶ the court acknowledged the difficulty in determining which manufacturer was actually responsible for the plaintiff's injury. The plaintiff stated for the record that he had developed mesothelioma and asbestosis during a long history of exposure to asbestos products. The plaintiff argued

30. *Supra* note 22 at 7. For a detailed discussion of establishing an asbestos case in court, see *supra* note 2 at 84.

31. No. 80-1842 (D.N.J. May 19, 1980).

32. *Asbestos Report Offers Creative Theories of Liability*, Legal Times of Washington, Nov. 16, 1981, at 1, col. 1.

33. No. B 81-0227-CA (E.D. Tex. April 22, 1981).

34. Legal Times of Washington, *supra* note 31 at 13, col. 4.

35. 493 F.2d 1076 (5th Cir. 1973).

36. *Id.* at 1076.

that asbestos was "unreasonably dangerous,"³⁷ suing general manufacturers of asbestos who, he claimed, were responsible for his medical condition. The plaintiff claimed that he was unaware of the dangers of asbestos exposure and was not warned of any dangers by the manufacturers who had a duty to warn. The jury verdict in favor of the plaintiff on strict liability theory was affirmed by the reviewing court.³⁸ The court in *Borel* decided that all involved manufacturers should be held "jointly and severally liable."³⁹

The *Borel* decision permits the injured plaintiff to recover in cases where no one manufacturer can be identified for liability. *Borel* also stands for the proposition that manufacturers knew or should have known of the dangers asbestos posed to workers.⁴⁰ As a result, some legal commentators have recommended that the doctrine of collateral estoppel be utilized to keep defendants from relitigating the issue of medical knowledge, because the defendants in the majority of cases have litigated the issue and lost.

Such an approach to the asbestos issue is clearly advantageous to schools seeking compensation to recover the costs of an asbestos cleanup. If *Borel* permits individuals to recover for asbestos-related injuries by suing all the manufacturers of asbestos generally, schools might also sue on an analogous theory, claiming that installation of asbestos was "unreasonably dangerous." This approach might be particularly helpful to those schools lacking a complete record indicating who is responsible for asbestos installation.

Another problem that schools must deal with is the special problem that statutes of limitation pose to the prospective plaintiff.

Under traditional rules of strict liability and negligence, the time allowed for bringing a suit begins to run at the time the plaintiff is exposed to the harmful substance. The problem with this approach when applied to latent diseases, like those caused by asbestos, is that it often leads to harsh results. Because it may take years for an asbestos-related disease to show up, the typical three or four years allowed for such a case to be brought may well be run before the plaintiff realizes he has been injured. As a result, the injured party has no recourse against manufacturers or other parties responsible for his medical condition.⁴¹

37. *Id.* at 1076.

38. *Id.* at 1081.

39. *Id.* at 1096.

40. *Id.* at 1096.

41. Comment, *The Asbestos Tragedy: Legal Issues and the Need for Reform*, 8 UNIV. DAYTON L. REV. 353, 358 (1983).

Some courts, responding to the harsh results of the traditional rule, have adopted the "discovery rule."⁴² Under the discovery rule, the plaintiff is permitted to recover even when the injury has taken a long time to develop. Once the plaintiff discovers the injury, or through reasonable care should have discovered it, the statutory period begins to run.

Other courts which might have adopted the "discovery rule" by judicial precedent have not because of their firm belief that any change from the tradition rule to the "discovery" type approach must be the result of legislative rather than judicial action.⁴³

When the Supreme Court of Virginia faced this particular issue in *Locke v. Johns-Manville Corp.*,⁴⁴ it applied an even different approach to the question. Under a statute of limitations that began to run when the plaintiff was injured, the court held that medical evidence determines when the injury occurred. According to this holding, medical evidence may pinpoint the date any time from an initial exposure to asbestos until the moment the asbestos-related disease is discovered.⁴⁵

The *Locke* decision has been attacked by critics as being essentially inequitable. Under this decision, two plaintiffs with similar diseases might be treated differently depending on the physical manifestations of asbestos-related disease. Critics also point to the fact that because of the broad interpretation of what constitutes an injury, the statute would probably begin to run at an early point in many asbestos cases, resulting in a denial of relief to plaintiffs.

As a statute benefitting schools who might wish to recover for asbestos containment, the discovery rule is most advantageous. Because schools did not discover the injurious character of asbestos in their schools until recently, the schools could argue that they had no knowledge or notice that an asbestos cleanup was necessary. Furthermore, the government has only recently enacted laws that take remedial action in schools where asbestos is found. This may constitute evidence that the general public has only recently discovered the general health

42. *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008 (1981). See also *Urie v. Thompson*, 337 U.S. 163 (1949) (silicosis); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982) (asbestosis); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155 (8th Cir. 1975) (asbestosis); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (asbestosis and mesothelioma), cert. denied, 419 U.S. 869 (1974); *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497 (Ky. 1979) (mesothelioma); *Haig v. Johns-Manville Prods. Corp.*, 284 Md. 70, 394 A.2d 299 (1978) (mesothelioma).

43. Note, *Preserving Causes of Action in Latent Disease Cases: The Locke v. Johns-Manville Corp. Date-of-the-Injury Accrual Rule*, 68 VA. L. REV. 615 (1982).

44. 221 Va. 951 (1981).

45. Comment, *The Asbestos Tragedy: Legal Issues and the Need for Reform*, *supra* note 41 at 355.

threat posed by the presence of asbestos in their schools. Since the health threat has only recently been discovered, the statute of limitations should begin to run when the inspection for asbestos in the plaintiff school has been completed.

The latest and most controversial issue in asbestos litigation deals with the question of whether asbestos victims will ever get their day in court. On August 26, 1982, the Manville Corporation, the largest supplier of asbestos in the world, filed for bankruptcy under Chapter 11 of the Bankruptcy Act of 1978. At the time of the filing, Manville was, and still is, in sound financial health. As of June 30, 1982, its net worth exceeded \$1.1 billion, it was able to pay debts as they became due, and was in every other respect solvent. Nevertheless, Manville Corporation decided to seek the shelter of the newly revised bankruptcy law in order to avoid the high costs of compensating victims of asbestos-related disease.

Immediately upon filing its bankruptcy petition, Manville brought to a halt approximately 16,000 lawsuits pending against it. Section 362 of the Bankruptcy Code provides that a petition stays the commencement or continuation of the judicial proceedings against the debtor that was or could have been commenced before the commencement of a case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.⁴⁶

By filing under Chapter 11 of the Bankruptcy Act, Manville hopes to have all of its asbestos claims estimated and discharged pursuant to a bankruptcy plan and without a jury trial. The constitutionality of such a plan is questionable.

As complex as asbestos litigation may become, the claims of asbestos victims have usually been based on traditional theories of negligence, strict liability, and breach of warranty. Each claimant has an attendance right to trial by jury. The Manville bankruptcy petition is ultimately weighing the personal rights of injured asbestos victims against Manville's own property interest.

Moreover, the rights of future claimants are also at stake. Despite the obvious denial of due process to those having their claim adjudicated before they know it exists, the precedent of a scheme that discharges liability for future latent disease is staggering. Other asbestos manufacturers, drug manufacturers, and the makers of other agents capable of causing latent disease might follow suit, using the bankruptcy code as a shield.

Regardless of this injustice, Manville argues that future claimants constitute "contingent" claimants dischargeable under Chapter 11. Ordinarily, contingent claimants are guarantors or sureties. As such, they

46. 11 U.S.C. § 362.

have normally received consideration for the possible discharge of their claims. This is clearly not the case with the asbestos victim whose relationship with the bankrupt was not contractual but developed as a result of exposure to the bankrupt's toxic products.⁴⁷

In fact, one court called the concept of discharging in bankruptcy "contingent" products liability claims "absurd." In the case of *In re Gladding Corp.*,⁴⁸ the debtor Gladding manufactured recreational vehicles. In 1975 it sold one of these vehicles to Arthur and Joan Coomes. In 1977 Gladding sought Chapter 11 protection. In 1978 its plan was confirmed. In 1979 the Coomes discovered a defect in their vehicle and filed suit against Gladding. Gladding claimed that the suit had been discharged by the confirmation of the Chapter 11 plan.

The court ruled that the claim was not previously discharged, stating:

The claim in question is one the exercise of which was not known until August 29, 1979, when Arthur and Joan Coomes brought suit against CEF. The debtor's Chapter XI plan had been confirmed more than eight months previous. If the Court were to adopt the debtor's argument, every retailer and consumer who purchases an item from a manufacturer, would then be compelled to file in the bankruptcy a proof of claim for some as yet unknown and undetermined possibility of damage. Such a procedure would be absurd.⁴⁹

Asbestos litigation involves a complex consideration of traditional theories of negligence, strict liability and breach of warranty, as well as the law of equity and bankruptcy. Schools searching for relief from asbestos hazards should consider all theories of liability and all potential defenses in such suits. Plaintiff schools should also consider the effect of statutes of limitation in their particular jurisdictions, as well as the potential effect of the Mansville Bankruptcy on their prospective claims.

47. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982). The U.S. Supreme Court significantly limited the broad grant of jurisdiction awarded the bankruptcy courts under the 1978 act. Specifically, the Court held that it is unconstitutional for the bankruptcy courts to hear all civil proceedings "arising in or related to" cases filed under the bankruptcy laws. This is so because the judicial power of the United States to adjudicate "private rights" must be vested in Article III bankruptcy courts, by judges with life tenure and protection against salary diminution. Bankruptcy judges clearly do not enjoy such a position and therefore cannot exercise the wide general jurisdiction of the U.S. district courts.

For an in-depth discussion of the Mansville bankruptcy petition and its potential effect on asbestos litigation, see J. Saginaw & B. Weinstein, *The Mansville Bankruptcy: Will Asbestos Victims Get Their Day in Court?* TRIAL 76 (1983).

48. 20 B.R. 566 (D. Mass. 1982).

49. *Id.* at 568.

In any case, the school that starts a remedial program would probably be best advised to follow the department of education regulations. If a subsequent lawsuit is then unsuccessful, the school might still be eligible for interest-free loans if or when the Congress appropriates the money authorized by the 1980 Act.⁵⁰

50. *Responding to the Threat of Asbestos-Containing Materials in School Buildings*, *supra* note 22.